ERNEST C. LAMB
v.
RICHARD R. STOFFEL

IBLA 77-400 Decided August 3, 1978

Appeal from dismissal by Administrative Law Judge Dean F. Ratzman of private contest against homestead entry AA-6720.

Affirmed

1. Alaska: Homesteads -- Contests and Protests: Generally -- Homesteads (Ordinary): Contests -- Rules of Practice: Private Contests

   Where the only properly corroborated fact alleged by private contestant related to situs of contestee's residence in 1975 and thereafter, but pre-complaint record included assertion by contestee that he lived on homestead in 1972, 1973, and 1974, the contestant has not thereby alleged facts which, if proved, would require cancellation of entry, and contest must be dismissed under 43 CFR 4.450-5(a).

2. Alaska: Homesteads -- Contests and Protests: Generally -- Homesteads (Ordinary): Contests -- Regulations: Interpretation -- Rules of Practice: Private Contests

   Although in his summary dismissal of private contest against homestead entry administrative law judge discussed issues upon which contestant had failed to submit corroborated allegations of fact along with his complaint, such action by judge did not relieve contestant of his burden of filing corroboration, despite provisions of 43 CFR 4.450-4(b) allowing judge to "raise issues in connection with deciding a contest."

3. Administrative Procedure: Administrative Law Judges -- Alaska: Homesteads -- Contests and Protests: Generally -- Homesteads (Ordinary): Contests -- Rules of Practice: Private Contests

Administrative law judge properly dismissed without a hearing a private homestead entry contest in which complaint failed to allege corroborated facts which, if proved, would provide sufficient basis for cancellation of entry.

4. Alaska: Homesteads -- Contests and Protests: Generally -- Homesteads (Ordinary): Contests -- Rules of Practice: Appeals: Generally -- Rules of Practice: Private Contests

Where contestant in private homestead entry contest appeals to Board of Land Appeals and makes certain assignments of error by administrative law judge, but allegations of fact upon which those assignments are based were not corroborated at filing of contest complaint, and issues raised by those assignments were not raised in complaint, such assignments are not material for purposes of appeal to the Board.

APPEARANCES: Charles E. Tulin, Esq., Anchorage, Alaska, for appellant-contestant; Keith A. Christenson, Esq., Johnson, Christenson, & Glass, Inc., Anchorage, Alaska, for appellee-contestee.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Ernest C. Lamb appeals from a May 10, 1977, dismissal by Administrative Law Judge Dean F. Ratzman of Lamb's private contest filed against the homestead entry, AA-6720, of Richard R. Stoffel, the appellee herein, on certain Federal lands in Alaska. 1/ See 43 U.S.C. § 161 et seq. (1970); 43 CFR 4.450 et seq.; 43 CFR Part 2510. 2/

1/ For the sake of clarity, appellant Lamb will be referred to as contestant, and appellee Stoffel will be referred to as contestee.

2/ Most, but not all of the homestead statutes codified in Title 43 of the United States Code have been repealed by sec. 702 of the Federal Land Policy and Management Act of 1976, P.L. 94-579, 90 Stat. 2787. Included in the repeal are 43 U.S.C. § 164 and § 185 (1970). Repeal in respect of lands in Alaska is not effective until October 21, 1986, however.

Contestee Stoffel was awarded a preference right to enter the property by Bureau of Land Management (BLM) decision of December 23, 1971. See 43 U.S.C. § 185 (1970). On January 5, 1972, he filed his Homestead Entry Application, and he alleges that he initially established residence on the land in March 1972. After BLM completed its administrative process, it allowed his entry on November 17, 1972. Contestee has alleged that he resided on the land for 7 months each year for 1972, 1973, and 1974. On November 12, 1974, he requested a leave of absence to live elsewhere for employment purposes. Contestee has alleged that he continued to cultivate the land, however, and his final proof lists cultivation in varying acreages from 1972 through 1976. See 43 U.S.C. § 164 (1970) and 43 CFR 2511.4-3.

On October 4, 1976, contestant Lamb filed his complaint alleging that the contestee was:

> [D]eficient in . . . residency upon the lands involved for the third and fourth entry years as required by 43 CFR 2511.4-2(a) and (e) and 43 CFR 2567.5(a) and (3), and further that if [contestee] should choose to claim credit for residency prior to date of entry under 43 CFR 2511.4-2(a), then [contestee is] deficient in cultivation in second and third year as well as residency for [his] fourth and fifth entry years under 43 CFR 2511.4-2(a) and (3), 43 CFR 2511.4-3(a)(2), and 43 CFR 2567.5(a)(2) and (b). Contestant further alleges that [contestee has] not personally resided for any period of time amounting to more than four weeks of continuous residence since November 1974 and even then [has] failed to comply with 43 CFR 2567.5(a)(2) which requires [him] to notify the proper land office both of leaving and returning thereto. [Emphasis in original.]

Along with the complaint, contestant submitted the following notarized declaration from a witness named Merrill F. Baird:

> I am [thoroughly] familiar with the land [in issue] and know that Richard R. Stoffel did not reside upon the land except for annual leave from work and on an occasional weekends [sic] during 1975 and 1976.

Contestant also filed statements not made under oath from two witnesses asserting that contestee lived at an address other than the homestead beginning in January 1975.

Contestee's answer recites in applicable portion as follows:

> I, Richard Stoffel, contestee, in answer to your complaint against my homestead entry (AA6720 HE) maintain that I am not deficient in my required prove-up for

said homestead. Answers to your specific complaints are as follows

(a) Residency - I am not personally deficient in my residency in my third and fourth entry years. In March, 1972, I established residency on the homestead and lived for at least seven months out of the year for three consecutive years as required by (43 CFR 2511.4-2) and 43 CFR 2567.5).

(b) Cultivation-I am not deficient in cultivation during my second and third entry years.

I cleared and cultivated approximately 1/16 of my land during the summer of 1974 (second entry year). I cleared and cultivated approximately 1/8 of my land during the summer of 1975 (third entry year). Thus complying with (43.CFR 2511.4-3) 43 CFR 2567.5

(c) In conclusion: I have never claimed and do not now claim to have resided on the homestead during 1975 and 1976. My residency was not required there during this time and circumstances did not permit me to live there full time. However, I have spent many weeks during these last two years living there working on my house and cultivating my fields in preparation of the time I can live on the homestead full time. I have used my absence in 1975 and 1976 to both generate the finances to continue the improvement on the homestead and get the training to farm properly in Alaska (i.e., I worked at the agricultural Experiment Station doing actual farming under expert supervision).

Since the main strength of the complaint against me is based on my nonresidency during 1974 and 1975 and since I am not required to have lived there during those years, I request the complaint against me dismissed.

43 CFR 2511.4-2(a) (1977) recites that an entryman "may have credit for residence as well as cultivation before the date of entry if the land was, during the period in question, subject to appropriation by him or included in an entry against which he had initiated a contest resulting afterwards in its cancellation." Contestee fell into the second category and availed himself of the March 1972 date as the commencement of his residence.

Without holding a hearing, the Administrative Law Judge dismissed the complaint for the following reasons inter alia:

> The corroborative documents and statements attached to Mr. Lamb's Complaint are concerned with only one allegation of fact -- that the contestee did not reside on the homestead entry during 1975 and 1976.
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> * * * * * * *
>
> Mr. Stoffel has not claimed and does not claim to have resided on the homestead during 1975 and 1976. Answer filed November 8, 1976. In his Final Proof he lists his three years of residence as 1972, 1973, and 1974. * * *
>
> Because Mr. Stoffel initiated a contest which resulted in cancellation of an entry, he is entitled to credit for residence before the date of allowance of his entry (November 17, 1972). 43 CFR § 2511.4-2. Thus, he could begin his residence of "at least 3 years", 43 CFR § 2567.5(a)(2), on or about March 15, 1972, as he asserts he did. * * *
>
> Most of the charges in the Complaint are couched in general terms and are without the required corroboration that the entryman failed to meet the requirements of one or more regulations. A private contestant must state facts affecting the validity of the entry which, if proved, would require cancellation of that entry.
>
> The charge relating to residency in 1975 and 1976 is not effectual because the prescribed length of residence is three years * * *. Because the Complaint does not set forth a reason providing proper grounds for a private contest, it is hereby dismissed.

The Judge also discussed the issues of cultivation and of contestee's failure to notify the BLM of his absences from the homestead.

Contestant makes the following assignments of error to the Judge's decision:

> (1) Failure to find deficiency in residency proof requirements because of the lack of certificate of occupancy, and due to reliance upon compliance reports (1975) which assumed that entryman had complied.
>
> (2) Failure to find deficiency in cultivation proof * * *.

> (3) An assumption that Bureau records would reflect that contestee complied with regulations as to notice of leaving and returning to the land each year [43 CFR 2511.4-2(d)] when, in fact, he complied only once, which fact has not been [judicially] noted.
>
> (4) Failure to apply 43 USC 166 and "relate back" cultivation dates upon deciding to allow early residency.
>
> (5) Failure to provide a hearing on the contest as required by 43 CFR § 4.431 * * *.
>
> (6) Failure to notice that since the allegations were answered in regard to cultivation no corroboration is necessary [43 USC 4.450-2 and 43 USC 4.450-4(b)]. [Emphasis in original.]

In addition, contestant argues that field reports of March 21, 1977, and March 29, 1977, which were made and filed by BLM officials subsequent to the date of the initiation of this contest should have been considered by the Administrative Law Judge in support of contestant's case.

Contestee contends that this appeal should be summarily dismissed because of procedural deficiencies in Contestant's case and because Contestant attempts to raise certain issues for the first time on appeal. Contestee alternatively urges that Contestant's arguments, supra, are not valid.

Contestant seeks to establish a preference right to enter under 43 U.S.C. § 185 (1970). 3/ That statute provides:

> In all cases where any person has contested, paid the land-office fees, and procured the cancellation of

3/ The lands in issue were withdrawn from appropriation effective March 28, 1974, subject to valid existing rights by PLO 5418, 39 FR 11547 (1974). A preference right under 43 U.S.C. § 185 (1970) which contestant might have acquired through this contest would not have been extinguished by the withdrawal, but exercise of the preference right would have had to have been postponed until restoration of the land to public entry. See McLaren v. Fleischer, 256 U.S. 477 (1921); Wells v. Fisher, 47 L.D. 288 (1919). This holding was commented favorably upon in Louis J. Hobbs, 77 I.D. 5 (1970). Such restoration would have had to have occurred before October 21, 1986. Note 2, supra; Edwards v. Unruh, 33 IBLA 277, 281 (1978).

> any * * * homestead * * * entry, he shall be notified by the officer designated by the Secretary of the Interior * * * of such cancellation, and shall be allowed thirty days from date of such notice to enter said lands * * *.

By regulation and in its case law the Department has determined and held that a Contestant may not validly base his contest against a homestead entry upon allegations of fact which are shown in the official records of the BLM. See 43 CFR 4.450-1; Christie v. O'Glesbee, 23 IBLA 155 (1975); Dale Johnson, A-30806 (Sep. 17, 1968), appeal dismissed per stipulation, No. A-135-68 (D. Alas. Apr. 10, 1969); Stephens v. Moen, A-30350 (Aug. 19, 1965); Gilbert v. Oliphant, 70 I.D. 128 (1963). 4/

Further, the regulations demand that a contestant initiate a private contest by filing a complaint, 43 CFR 4.450-3, and specific requirements for the contents of the complaint are given in 43 CFR 4.450-4(a). In 43 CFR 4.450-4(b), (c), and (e), it is provided:

> (b) Amendment of complaint. Except insofar as the Manager, Administrative Law Judge, Director, Board or Secretary may raise issues in connection with deciding a contest, issues not raised in a complaint may not be raised later by the contestant unless the administrative law judge permits the complaint to be amended after due notice to the other parties and an opportunity to object.
>
> (c) Corroboration required. All allegations of fact in the complaint which are not matters of official

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4/ The purpose of the preference right provision in 43 U.S.C. § 185 (1970) has been commented upon by the courts. In McLaren v. Fleischer, note 4, supra, the Supreme Court said at page 479:

"* * * one Fleischer instituted a contest against Rider's entry, at his own cost collected and presented evidence establishing its invalidity and procured its cancellation. * * * Fleischer had no claim to the land prior to the contest and in instituting and carrying it through acted as a common informer, which was admissible under the public land laws. To encourage the elimination of unlawful entries by such contests Congress had declared [the 43 U.S.C. § 185 preference right." (Emphasis supplied.) Accord, Unruh v. Udall, 269 F. Supp. 97, 98 (D. Nev. 1967). Such a legislative purpose would hardly be served by a contestant's informing the BLM of what it already is aware.

> record or capable of being judicially noticed and which, if proved, would invalidate the adverse interest must be corroborated under oath by the statement of witnesses. Each such allegation of fact must be corroborated by the statement of at least one witness having personal knowledge of the alleged fact and such fact must be set forth in the statement. All statements by witnesses shall be attached to the complaint. [Emphasis supplied.]
>
> * * * * * * *
>
> (e) Waiver of issues. Any issue not raised by a private contestant in accordance with the provisions of paragraph (b) of this section, which was known to him, or could have been known to him by the exercise of reasonable diligence, shall be deemed to have been waived by him, and he shall thereafter be forever barred from raising such issue.

The result of a Contestant's failure to comply with these requirements is dictated by 43 CFR 4.450-5(a): "If a complaint when filed does not meet all the requirements of § 4.450-4(a) and (c) * * * the complaint will be summarily dismissed by the manager and no answer need be filed." The Department has held that a contest based on a complaint failing to satisfy the corroboration requirement stated in the regulations is properly dismissed. William Dittman, A-27312 (June 25, 1956); Cf. Porter v. Morrell, A-30562 (June 29, 1966). 5/ The purpose is to screen out those cases in which the contestants have no substantial evidence on which to base their charges against established homestead entries.

The primary question posed in this appeal is the sufficiency of Contestant's complaint. Despite the several issues he raises on appeal, the only proper corroborating statement he filed -- two of the statements were not taken under oath, as required by the regulations -- presented allegations on the situs of Contestee's residency in 1975 and thereafter. The pre-complaint record in this case includes claims by contestee and an unrelated witness, Stephen E. Murphy, that contestee settled on the land in March

5/ As the Department pointed out in Wadsworth v. Anhder, 70 I.D. 537 (1963), a dismissal for lack of corroboration is of itself not a bar to the filing of a second contest complaint which is properly corroborated. We do not reach the question of whether another filing by contestant in this matter would be valid.

1972, 6/ but the complaint did not dispute this alleged date of settlement. Nor is contestant's charge as to contestee's residence in 1975 and thereafter in contradiction of contestee's assertion, filed with BLM prior to the complaint, that he resided on the land in 1972, 1973, and 1974 in satisfaction of the 3-year term of residency mandated in 43 U.S.C. § 164 (1970).

[1] Under 43 CFR 4.450-4(a)(4), the complaint must contain a "statement in clear and concise language of the facts constituting the grounds of contest." Citing this language, the Department in Covington v. Long, A-30339 (Aug. 9, 1965), held:

> It is well established that in a private contest subject to this regulation, a contest charge to be adequate must allege facts affecting the validity of an entry which, if proved, would require cancellation of the entry and that a complaint is properly dismissed if it fails to do so. James W. Shumaker v. Robert J. Scott, A-29977 (February 20, 1964); August F. Scheele v. Johnny H. Dockery, 68 I.D. 100 (1961); Earl D. Deater v. John C. Slagle, A-28121 (May 24, 1960).

Contestant's corroborated allegations on contestee's years of nonresidency on the homestead do not meet the standards for valid initiation of a contest as given in 43 CFR 4.450-4, and the complaint must be dismissed under 43 CFR 4.450-5(a).

Consla v. Wetherelt, 30 IBLA 311 (1977), is analogous to the case at hand. There we held that a contest complaint was properly dismissed by BLM where the only allegation by the contestant was failure to comply with residency and cultivation requirements, but the record showed that the time for the contestee's satisfaction of the requirements had not yet run. Logically, the contestant's charges were incapable of defeating the contestee's entry, even if they were assumed to be true. A similar analysis, for the

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6/ 43 U.S.C. § 164 (1970) provided that the entryman must reside upon the land "for the term of three years succeeding the time of filing the affidavit" required by 43 U.S.C. § 162 (1970). Such an affidavit was incorporated in this contestee's Homestead Entry Application which was filed with the BLM on January 5, 1972. Under 43 CFR 2511.4-2(a), an entryman "may have credit for residence as well as cultivation before the date of entry if the land was * * * included in an entry against which he had initiated a contest resulting afterwards in its cancellation." As noted in the text, the date of entry in this case was November 17, 1972.

reasons discussed supra, is applicable in the instant case. On this point, see also Darling v. Lewellan, A 30885 (June 13, 1968), pp. 4-5.

Contestant argues that despite the lack of corroboration filed with the complaint, since contestee in his answer to the complaint answered contestant's charge of insufficient residency and cultivation, and because the Administrative Law Judge in his decision discussed the issues of residency, cultivation, and notice of absence requirements, "clearly all three issues are subject to review." Contestant maintains that "no corroboration is necessary" under the circumstances, and he cites 43 CFR 4.450-2 and 43 CFR 4.450-4(b) as the basis for this proposition. We note that 43 CFR 4.450-2 is clearly inapplicable here. 7/ That regulation deals with protests. In 43 CFR 4.450-1 it is given that the private contest is the appropriate procedure for those seeking to acquire a preference right under 43 U.S.C. § 185.

That leaves us with the question of the applicability of 43 CFR 4.450-4(b) under the facts of this case. That regulation does provide for the Administrative Law Judge to "raise issues in connection with deciding a contest" even though those issues were not brought out in the complaint. In his decision, the Administrative Law Judge discussed the issues of cultivation and notice of absence from the homestead even though the lack of contestant's sufficient corroboration would have been fatal of itself to contestant's subsequent use of those issues. Our reading of 43 CFR 4.450-4(b) against the backdrop of the other regulations and the case law on contests leads us to the conclusion that contestant's argument on this point is without merit insofar as he claims it abrogates any defects in his complaint.

The issues raised in a case must be based upon the facts alleged in it. The private contest regulations at 43 CFR 4.450-4(c) and (e) differentiate between corroboration of facts and waiver of issues, and such a distinction would not be necessary if the regulations intended "facts" and "issues" to be a mixed bag for purposes of corroboration. As we have pointed out above, a private contestant may not depend upon the facts reflected in the official records

7/ This regulation provides:

"§ 4.450-2 Protests. Where the elements of a contest are not present, any objection raised by any person to any action proposed to be taken in any proceeding before the Bureau will be deemed to be a protest and such action thereon will be taken as is deemed to be appropriate in the circumstances."

of the BLM to corroborate his allegations, and the Administrative Law Judge certainly cannot be deemed to have sua sponte provided corroboration or other substantiation of contestant's case.

[2] For these reasons, we cannot agree that the provision in 43 CFR 4.450-4(b) allowing the Administrative Law Judge to raise new issues affects contestant's burden of stating the "facts constituting the grounds of contest," 43 CFR 4.450-4(a)(4), and of corroborating those facts. Although in his summary dismissal of this private contest the Administrative Law Judge discussed issues upon which contestant had failed to submit corroborated allegations of fact along with his complaint, such action by the Judge did not relieve contestant of his burden of filing corroboration, and contestant's failure to corroborate remained a fatal defect in his complaint.

[3] Contestant argues that he was denied his right to a hearing before the Administrative Law Judge as provided for in 43 CFR 4.452 et seq. However, we note that the BLM Manager need not refer the case to an Administrative Law Judge unless he "determin[es] that the elements of a private contest appear to have been established." 43 CFR 4.450-7(b). Indeed, the BLM may summarily dismiss a contest complaint which is insufficient beyond question on its face or in view of the facts disclosed in the official record. 43 CFR 4.450-5(a); see Consla v. Wetherelt, supra; Christie v. O'Glesbee, supra. Although the regulations do not explicitly give summary dismissal authority to the Administrative Law Judge in a private contest, it is implicit that his power in respect of this function is at least as great as that of the BLM official who refers the case to him. The action of the BLM official in merely referring the case to the Administrative Law Judge cannot confer any greater sufficiency to the complaint than it exhibited when it came to the BLM. Further we do not read the regulations as intending that a contestant receive a meaningless hearing when he has filed a clearly insufficient complaint. Therefore, we hold that the Administrative Law Judge properly dismissed without a hearing this private contest because contestant's complaint failed to allege facts which, if proved, would provide a sufficient basis for cancellation of contestee's homestead entry.

[4] In respect of the other assignments of error advanced by contestant in his statement of reasons on appeal, and in respect of the complaint's allegations and issues other than those discussed above, we note on each point that either the allegations of fact contained therein were not corroborated at the filing of the complaint, or the issues argued therein were not raised in the complaint and were therefore waived under 43 CFR 4.450-4(e). Therefore, such assignments and their allegations and issues are not material for purposes of an appeal from the decision of the Administrative Law Judge to this Board. On a related point, contestant urges that

certain field reports executed and filed by BLM officials after the contest was initiated must be considered in support of the charge of insufficient cultivation. Since neither the cultivation issue nor any other persuasive issue was ever joined in this proceeding because of the failure of corroboration, the complaint must be summarily rejected under 43 CFR 4.450-5(a). Subsequent reports by BLM officials, even assuming arguendo that they could properly be used in support of the contest, are immaterial to the complaint, which was fatally defective ab initio.

Contestee has raised certain procedural issues. In view of our holding, it is not necessary that we reach them.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Frederick Fishman
Administrative Judge

I concur:

James L. Burski
Administrative Judge

I concur in the result:

Joan B. Thompson
Administrative Judge